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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

COMMENTS OF THE NATIONAL RETAIL FEDERATION

In the Matter of

Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	**CG Docket No. 02-278** **CC Docket No. 92-90**

Mallory B. Duncan
Senior Vice President
General Counsel

Elizabeth Treanor
Government Relations Counsel

National Retail Federation
325 7th Street, N.W.
Suite 1100
Washington, D.C. 20004
(202) 783-7971

December 9, 2002

No. of Copies rec'd 0+4
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Telephone Consumer Protection Act
Comments of the National Retail Federation

On behalf of the retail industry, the National Retail Federation ("NRF") submits the following comments regarding the notice of proposed rulemaking with respect to the Federal Communication Commission's ("Commission's") rules with respect to the Telephone Consumer Protection Act (TCPA). Telemarketing, both inbound and outbound, is among the tools many retailers use to communicate with their customers. Our members currently comply both with the Commission's rules as well as with the Telemarketing Sales Rule ("TSR) of the Federal Trade Commission ("FTC"), adopted pursuant to the Telemarketing and Consumer Fraud and Abuse Prevention Act. We do not believe that our members were the focus of the difficulties the TCPA was enacted to address. They do however bear the burdens of compliance. Nevertheless, NRF has worked with its members (and with the FTC) to ensure that retailers observe existing telemarketing requirements, whether embodied in the Commission's Rules, the TSR or elsewhere. Any change to those rules potentially has great effects on our members' operations.

By way of background, the National Retail Federation is the world's largest retail trade association with membership that comprises all retail formats and channels of distribution including department, specialty, discount, catalog, Internet and independent stores. NRF members represent an industry that encompasses more than 1.4 million U.S. retail establishments, employs more than 20 million people -- about 1 in 5 American workers -- and registered 2001 sales of $3.5 trillion. NRF's international members operate stores in more than 50 nations. In its role as the retail industry's umbrella group, NRF also represents 32 national and 50 state associations in the U.S. Both NRF's larger and smaller members will he very much affected by the proposed changes to the rule.

Telemarketing is an important issue. Retailers who use it as a tool should be sensitive to the concerns of the individuals they attempt to contact. As it has in the past, the Commission should provide strong, bright lines, beyond which no marketer can legally traverse, along with a combination of industry guidance and the means of enforcement for activity beyond those lines.

These comments are divided into two sections. In the first we briefly discuss general considerations related to the NPRM. The second section consists of factors that must be incorporated into a rule should the Commission decide to proceed with changes. They are very similar to the recommendations NRF proposed to the FTC. They are not options, they are interrelated operational necessities. All of them are essential to **a** reasonable rule.

I. General Considerations

The Development of a National Do Not Call List

Under the 1991 TCPA, it was within the Commission's discretion whether to establish a national do not call list or to provide for some other means of protecting consumers' privacy interests. After a careful balancing of the costs and benefits associated with each alternative, the Commission established a rule base on company specific call blocking. That rule recognized, on the one hand, that many consumers appreciate the opportunity to transact business with some merchants from the convenience of their homes; but have an interest in terminating future communications from others. Accordingly, the Commission required companies to establish do not call lists and to provide consumers with the opportunity to have their names placed on those lists in response to an unwanted call.

This had several positive effects. It did not unduly burden commerce because it allowed companies the opportunity to continue to present themselves to consumers for consideration. **As** with an advertisement in a magazine, consumers may expend a great deal of time perusing the seller's message or may dismiss it quickly. However the rule also allowed individuals to selectively remove themselves from the calling lists of sellers promoting products and services in which the consumers were not interested. (Unlike a printed advertisement that may continue to appear in subsequent issues of the magazine regardless of the reader's disinterest.) Thus, while there may have been some effort required in effectuating the Commission's do not call procedures, the net effect was a gradual diminution in the number of businesses capable of contacting a household as it's telephone number was added to companies' do not call databases and those of the teleservice agencies with whom the companies contract.

A further advantage of the Commission's rule was that it recognized likely differences in attitudes among consumers towards companies based on their prior experience. Few things are more valuable to a retailer than a satisfied customer. It is far easier to continue to do business with an existing customer than it is to recruit a new one. For this reason, NRF's members pay particular attention to customer retention and customer relationship marketing. Fortunately, the Commission specifically provided for an Established Business Relationship exception in its existing rules. This critical element slightly further shifted the presumption in favor of communication in those cases where a consumer had already taken steps to interact with a particular seller. While those companies too must maintain do not call lists, they are offered an additional incentive to treat their existing customers with greater sensitivity so that consumers will not avail themselves of the option of terminating the relationship.

The Changing Environment

There have been some changes since Congress adopted the TCPA in 1991. Some of them might lead the Commission, as apparently they have led the FTC, to consider modification of existing telemarketing rules. The first of these is technological expansion.

As the Commission has noted, the growth in use and increasing sophistication of automatic telephone dialing systems may necessitate reconsideration of its rules. The greater use of predictive dialers allows marketers to reach more households more efficiently. This in turn incrementally increases the number of sellers, previously unknown to the targeted consumers, who may be attempting to reach any particular household. Similarly, the expanded use of answering machine detection may mean that more households are exposed to longer periods of "dead air" than they were in the past. Thus the time costs to consumers of exercising their company specific do not call rights may have increased as well. If so, this may subtly alter the costbenefit balance between businesses' efforts to deliver messages to consumers and consumers' ability to avoid those messages. Part of the Commission's original equation was that consumers would be able to reduce the number of unwanted calls by gradually removing those callers from the mix of messages they received. If, however, technology is allowing the number of unwanted calls to expand at a greater rate than they are being removed and/or if the cost of removing those calls is increasing without compensating technological improvements on the consumer side of the equation, a modified do not call formulation may **be** needed.

Chaneine Laws

Perhaps in response to these trends, there has been a move afoot in several states to eliminate more calls, more quickly than the careful tailoring the Commission's rules encourage. Approximately half of the states have adopted some form of a statewide do not call list program. Although the programs vary widely in coverage and operation, most require individuals periodically to register their contact information with the state (or an organization operating on its behalf). Registration may be free, or subject to a periodic charge. Depending on whether their proposed telemarketing activities fall within exceptions in the state laws, sellers seeking to call within the state are required to purchase updated lists on a regular basis. Telemarketers are then expected to remove listed telephone numbers from their calling programs unless there exists an exception for the particular number being called.

The speed with which they are being adopted by legislatures suggests that these programs are politically popular. Nevertheless, in many cases they offer a far less than perfect means of addressing telemarketing concerns. As mentioned, they at times take an all or nothing approach to telemarketing – unduly restricting retailers' and their best customers' abilities to communicate freely. They also can be quite expensive. Retailers with operations in several states may be forced to buy multiple lists that require updating at inconsistent periods. The coverage of the state programs may vary widely. This raises a question each time a retailer launches a calling program, i.e. whether elements of it fall within or without the provisions of each state in which calls are being made. Multi-state companies that operate from a single database must forego all contacts with individuals on the lists, attempt to match the contents of their calls to the provisions of the applicable law, or, where possible, place interstate calls to customers within a particularly troublesome state, provided of course the individuals have not availed themselves of an opt-out under the Commission's existing rule.

From a consumer's standpoint, the myriad of exceptions, alternatives and requirements of state laws may be equally confusing. Furthermore, the generally intrastate only reach of these laws means that, by signing onto the statewide list, consumers are more likely shutting out local retailers with whom they are more likely to be familiar while remaining open to calls from more distant sellers.

Commission Response

In light of this, NRF members had a mixed reaction to the FTC's proposed changes to the TSR, especially the adoption of a national do not call listing. On the one hand, there are potential advantages to consumers and many businesses in a carefully designed rule and do not call list of national scope. On the other hand, a poorly designed rule could needlessly limit both buyers' and sellers' options while adding the unnecessary costs of complication to the process.

Given the number of states that have already adopted intrastate do not call lists, there is little advantage in adding yet another (albeit federal) list to the mix unless some of the underlying contradictory rules are alleviated. If the federal rule merely replicates some of the more restrictive underlying state provisions then the careful tailoring of calls to the individuals' wants, which the Commission strove to achieve in its original rule, could be lost. Worse, if the rule sets atop the existing state law patchwork, further complicating businesses' and consumers' ability to establish consistent, predictable means of interacting, it could make the telemarketing arena the source of greater frustration for both parties. Finally, as was suggested in its NPR, were the Commission and the FTC to adopt significantly different do not call regimes, that would further confuse consumers and those businesses that engage in legitimate telephone commerce.

On the other hand, the adoption of similar rules by the FTC and the Commission, especially if they final product greatly lessens the burdens of inconsistent state laws, has tremendous potential for improving consumer and business welfare. A thoughtfully developed national do not call program is one such approach.

Imuortance of the Commission's Involvement

For the foregoing reasons it is important not only that the Commission proceed with its NPR, but that it do so within the same time frame and to the same extent as does the FTC. Ideally, in spite of the FTC's earlier dated proposal, the Commission's rule should issue contemporaneously with that of the FTC.

As was mentioned, Congress gave the Commission explicit authority to consider, and adopt if appropriate, a national do not call program. It did not provide such explicit authority to the FTC. Indeed, there is a serious question as to whether the FTC has the authority to establish a national do not call list. The Telemarketing and Consumer Fraud and Abuse Prevention Act provided the FTC authority to develop a rule governing deceptive or abusive activities. The existing Telemarketing Sales Rule addresses many practices consistent with that mandate. Thus, in order to prevent deception, prior to a telemarketing sale being consummated, a company can be required to not mislead a customer by failing to reveal the total cost of the order as well as the substance of an unusual or an unexpected refund or return policy. The FTC can adopt such **a** rule because any action taken that hides the true cost of a purchase is highly likely to cause significant injury to the customer purchasing that merchandise.

Similarly a company can be prohibited from engaging in an abusive practice such as using threats in order to accomplish a telemarketing sale. Each individual who is threatened suffers the personal harm associated with the fear arising from threats. Although the law did not create a right to regulate on the basis of unfairness, it is clear that the rule could be expanded to the extent additional deceptive or abusive activities were identified by the FTC.

However, for a number of reasons, mandatory adherence to a FTC-established do not call list of telephone numbers meets neither of these requirements and exceeds the FTC's authority under the law. This can be summarized simply. At base, there has been no demonstration that the decision by a retailer to make telephone sales calls to two established customers, whom it may never have called before, is either a deceptive or an abusive practice under any fair reading of the law. Yet that is the gravamen of the FTC proposed rule.

As proposed, no retailer, regardless of size, could make two sales calls from Chicago to customers in Michigan (or from Cincinnati to nearby Covington, Kentucky), without first contacting a federal agency in Washington, D.C. to determine whether he or she would be permitted to do so. This would be an extraordinary expansion of federal involvement into business activity, and it would be premised on nothing for which Congress has granted the FTC authority to regulate. We have found no basis in the law, and the FTC's notice of proposed rulemaking cites no basis consistent with the law. The Commission, on the other hand, suffers from no such impediment.

As with the TSR, the FTC has shown a willingness to follow the lead of the Commission in an area that is expressly within the Commission's jurisdiction. Thus the FTC specifically enforces the Commission's existing rule, deeming a violation of it by any entity within the FTC's jurisdiction to be a violation of the TSR. Were the Commission to act first, it also is likely, due both to a desire for consistency of federal law as well as a recognition of the scope of the Commission's jurisdiction and expertise, that the FTC would adopt a rule reflective of the Commission's judgment in this area.

The Commission may determine that the company specific program works well and needs only modest modification – such as making it explicit that new automatic technology is indeed encompassed within the Commission's existing rules. Or it may determine that events have changed sufficiently over the past decade that a national do not call program is appropriate. Should the latter be the case, we ask that the Commission remain sensitive to cost/benefit considerations it found persuasive at the time of its rule's adoption.

<u>Costs Associated with a National Do Not Call Program</u>

Unlike some other industries, retailers, whether large or small, operate under extremely tight margins. For that reason, analysis of the costs and benefits of the proposed rule and its constituent parts will require extraordinary sensitivity on behalf of the Commission if it is not to unduly hamper those operations. Based on the available data from the FTC, it appears that the cost of the proposed regulation may be unacceptably burdensome, especially for smaller retail operations.

The Commission nor the FTC has not placed the ultimate cost of a do not call program on the public record. 'Therefore, it is not possible to perform a true cost/benefit analysis. **We** understand, however, that one state (Indiana) charges companies **$300** per year for access to its quarterly issued list (i.e. $75.00/list). The FTC proposes to update its list monthly. It is unclear whether the cost to obtain the list would increase proportionately. Would the hypothetical retailer above (even a specialty merchant who might have only a few hundred out of state customers) be required to spend nearly a

[1] **In a supplemental rulemaking proposal and in testimony, the FTC suggested that the cost of its do not call proposal would not exceed a few million dollars in total per year, and would involve a business cost of no more three thousand dollars per participating company per year for access to do not call lists. It is our understanding, however, that Congress may be considering the need for a funding authorization amount for the program that is significantly greater than was initially proposed.**

thousand dollars per year (12 x $75) in order to determine whether any of those customers happened to be on the FTC's proposed list?

There is additionally the cost to a small retailer of having to purge its customer list on a monthly basis. There also are logistical problems, especially for calls to existing customers. Such calls are typically generated from the company's customer records, not from a segregated "list" which can be compared to a do not call list. To implement a national do not call list, a retailer would have to find a way to incorporate the list – and every update to the list - into the retailer's system. There are likely as many different systems as there are retailers. Moreover, unlike larger companies, small retailers are far less likely to have computerized customer lists. (Indeed, even many large companies still maintain favored customer lists in a paper format.) Those smaller retailers that are computerized typically lack the in-house expertise to make the conversion to a phone number accessible list. Instead, those companies will need to rely on outside vendors to reformulate their data. The fewer the number of customers, the higher the per name cost of conversion would be. Thus, unless a business owner were willing to retype all of the information herself, a company with only five or ten thousand names in its database might face an initial cost of nearly a dollar per name in order to have its list converted to a phone number-searchable file.

Once that was accomplished, the company would face the cost of purging the list of names each time an updated list was produced. Again, the cost of purging is dependent on the volume of numbers to be manipulated. While a very large list might be handled for a penny a name, a shorter list – such as the example above – could cost from ten to fifty cents a name. Depending on how often a do not call rule required lists to be updated, this cost would be repeated. If, as the FTC proposes, this were to be done monthly, a small business would face a new expense of several thousand dollars per year (on top of the several thousand dollar initial set-up) before it could begin to contact its customers.

For many such businesses, the cost to the retailer is measured not only in money, but more importantly, in time. For smaller businesses in particular, the extra hours they may be forced to spend in order to prepare to contact their customers is subtracted from the time they could spend serving those customers. The practical effect of a do not call rule for such businesses may be that they simply could not afford to contact customers they had served in the past. For that group, the FTC proposed rule is a ***de facto*** prohibition.

II. Essential Requirements of a Reasonable Rule

Preemption

If, despite questions as to the potentially heavy business costs associated with it, the Commission proceeds with a national do not call program, it should do so in a method that attempts to lessen some of the burdens such programs impose. One means by which the Commission could help mitigate the costs of administering a do not call system is by developing a reasonable system coupled with some form of preemption.

At present, approximately half of the states have adopted do not call requirements governing some telemarketing sales. In general, individually, most of the state laws are significantly less burdensome than the FTC proposed rule. For multi-state retailers however, they are collectively more burdensome than would be a single national rule that adopted their features.

As was mentioned, difficulties occur with multiple state rules because they present the do not call information in widely differing formats, requiring companies to reconcile those formats within their systems. For example, the states vary tremendously in the frequency with which they publish do not call lists and/or the time within which they expect company lists to be updated. The exceptions to the do not call provisions also vary by state. **A** retailer that operates in several states, perhaps with some of its customers located in still other states and which places calls from still other states, could find itself with a bewildering set of requirements. Were the Commission to go forward with a national do not call list, it could provide a benefit to retailers facing this conundrum by substituting for these state programs a single national standard (provided that standard recognizes – as has the Commission and virtually every existing state law - established business relationships). If an effective national do not call list is to be developed, it must be a reasonable and preemptive program.

Technically, some state laws govern only in-state (intrastate) calls while a Commission rule could govern all calls, both out-of-state (interstate) and intrastate calls. NRF's larger members, which are subject to the conflicting requirements mentioned above, generally ignore the distinction between these two types of calls and instead interpret the state lists more broadly than necessary. That is, to the extent central databases exist, if a customer places his or her number on a particular state's intrastate do not call list, the retailer flags it on the database as a do not call number for interstate purposes as well.

Under such circumstances, a fifty state retailer is already subject to, and is required to purchase and use, all twenty-four existing state lists. As other state legislatures consider adopting similar laws to demonstrate support for the politically popular trend of placing curbs on intrastate calls, retailers will be required to purchase those lists as well. If the Commission adopts a rule without invoking preemption, then the Commission will merely have added more burdens on businesses. The Commission's list simply becomes ***one more** list,* the twenty-fifth list (or the fifty-first list), that national retailers would be forced to administer. Furthermore, because of its national scope (it is unknown whether the Commission would offer state-by-state or other regional versions of its list – we recommend the former), the Commission's list is likely to be more expensive to acquire and use than the state lists. A new national list will also add its own complexities in terms of timing and coverage all of which, depending on the composition of the final rule, will further increase the cost of compliance.

Indeed, unless the Commission preempts state laws, it might unintentionally be confusing to consumers who, not knowing that they had only opted out of *interstate culls* via the do not call list, might mistakenly assume that in-state callers were knowingly violating the law. This could actually frustrate the Commission's purpose by undermining the apparent effectiveness of do not call programs.

On the other hand, were the Commission to invoke preemption in conjunction with its proposed rule, consumers could receive the benefits the Commission would have chosen to seek in adopting a national do not call list and businesses would be spared the conflicting patchwork of state regulations that has developed and which a non-preemptive rule would exacerbate.

Adoption of a Reasonable Rule: Preserving Established Business Relationshius ("EBRs")

Critical to acceptance of the proposed rule, and the second essential requirement, is that it recognize the existence and importance of retailer/customer relationships. The Commission has already recognized the importance of established business relationships in a number of aspects of its existing rule. The overwhelming majority of state laws (indeed all but one – and that one provides other exceptions) exempt from their coverage those situations where the retailer/customer relationship has already been established. As discussed below, such an approach allows an individual to prohibit the vast majority of companies, who would otherwise be free to do so, from calling that individual.

The Commission's Telephone Consumer Protection Act's company-specific do not call regulations enable consumers to prevent calls from firms with which they do business but from whom they do not want to receive calls. This is a deterrent to legitimate firms who do not treat their customers with the sensitivity those customers expect. This combination, a national do not call list and company-specific deletions, makes it more likely that the rule will preserve the free flow of information related to products and services with which consumers have an involvement, while restricting, when desired, that for which they do not.

It has been suggested by others in opposition to EBR's that there have been reports of complaints from some consumers who signed up for a state list but continue to receive calls. There are two broad categories from which it is likely these calls arise:

> The first is that consumers may still receive calls from companies who are not governed by the state law. These could either be interstate calls or calls from entities that have been given a blanket exemption by the state legislature regardless of whether they have established a relationship with the consumer. For example, charities, political organizations or real estate agents might be exempted from a state law's coverage.

> The second category includes calls from companies who are ignorant of the law, companies for whom the costs or other burdens of compliance are so high that they cannot afford them (and remain in business), and companies for whom the benefits of cheating are so great that they are willing to risk the costs of noncompliance.

As to the first category, subject to enforcement, except where the Commission has not exercised jurisdiction, the company-specific do not call provisions will remove customers' names from the remaining companies' lists. Where the Commission does not exercise jurisdiction (e.g. calls by charities seeking donations) the failure to include an established business relationship in the rule will not diminish those calls.

As to the second category, the failure to include an established business relationship in the rule does not diminish the likelihood that consumers will receive those calls. The only remedy for those calls is education and enforcement. If those two elements are lacking, no rule will successfully stop those calls. In short, the Commission should continue to distinguish the benefits of an EBR provision from reports that are driven by a failure of knowledge, coverage or enforcement.

Cost of Not Adopting An Established Business Relationship Provision

Direct Conseauences

Since retailers have had no significant experience with a situation in which companies are precluded from calling their own customers, what is the proper base from which to calculate cost? Is it the total number of sales made as a result of telemarketing calls? To use one area of marketing, “clientelling” is the retail practice of gradually nurturing a relationship with a customer (short of an explicit “personal shopper” involvement) to provide greater convenience and more personalized service. The sales associates are trained to be sensitive to particular customers’ desires and then to provide a customized level of service, often without being asked. For example, a customer may receive a call giving her advance notice that a frequently-purchased product is going on sale. When a favorite designer’s new collection has arrived, a sales associate may call and offer to hold the customer’s size until it is convenient for the customer to come into the store, or may offer to send the item to the customer. Several, typically somewhat more exclusive, stores have developed very loyal customer bases as a result of these efforts. The calls are based on an informal personal relationship between the consumer and the retailer (frequently, a particular department or a specific salesperson). It is extremely doubtful that customers receiving this type of personalized service even consider the calls to be “telemarketing,” let alone intend the calls to cease simply because they choose to eliminate unsolicited calls by signing up for a do not call list. Yet sections 310.4(b)(1)(iii)(b) and 310.6(c) of the proposed rule presume this to be the case.

One well-known department store determined that clientelling alone, which relies heavily on telephone marketing, amounted to approximately six percent of their annual sales. (The same company engages in other forms of telemarketing as well.) Six percent is not the precise measure of the loss from the currently proposed rule because the company does not know what percent of its customers would place themselves on a national do not call list. Nor does it know what percent of those would subsequently provide affirmative permission to call despite placing their name on the list. It does know that customers would immediately fall into two categories. The first is those customers with whom the company had established a clientelling relationship prior to the rule's adoption. Those customers would have had an opportunity to witness the company's service; determine that the company did not abuse their trust; and evaluate, based on experience, the benefits the clientelling relationship provides. Those individuals could more easily make a determination, when approached after the rule goes into effect, whether they wished to override their do not call listing on behalf of that company.

However, there would be a second, larger category of new customers on the do not call list who would not have had that experience. They have not had the opportunity to judge how the company manages its customer base. Yet the company's history demonstrates that those who become its customers, if they were marketed to in the same manner as their more experienced predecessors, would also have come to value the business to the same six percent level of total department store sales. However, as a result of the proposed rule's operation, unlike customers who have had a favorable experience with the company's telephone practices, the new customers would have no basis on which to determine they should seek the benefits their predecessors achieved.

Again, it's important to note that we are only talking about customers who establish a relationship with the store. Those who do not could not be telemarketed to. Since an individual can only establish a limited number of company relationships, approximately 99.9% of the 1.4 million U.S. retailers could <u>not</u> make a sales call to an individual on the list.

Accordingly, if the Commission preserved the established business relationship exemption provided in its own rule and in most state laws, the overwhelming majority of

Commission regulated calls would be blocked, yet the up to six percent sales volume of calls to which satisfied customers currently respond would be preserved (less any who chose to place themselves on the company-specific do not call list).

A successful anchor department store in a mall (at which clientelling takes place) typically has somewhat more than one hundred million dollars in annual sales. Depending on the percentage of customers who put themselves on the do not call list, the lack of an established business relationship provision therefore initially could equal six percent of that percentage in loss of sales. That is, if 30% of customers subscribed to the list, the immediate loss would be more than $2,000,000 in sales, per store in the first year.

As suggested above, however, over time the store might be able to effectively recruit back those customers who gradually come to realize that they have been dropped from the lists of the company with whom they had been dealing. They at least have the advantage of having had the experience with the company to evaluate whether it manages its calls in such a manner that they wish to hear from the company again. Not so for those DNC listed consumers who had not yet had such dealings with the company.

If, as it appears, comfortable experience with the company's calling program is a significant portion of what makes clientelling successful, then the rule's bias against that experience *(with companies customers have chosen to do business with, as opposed to the 99+% with whom they have not and whose sales calls would be blocked by the rule regardless of whether it contained an EBR provision)* significantly increases the rule's cost. No business survives by only serving its long standing customers. Depending on the underlying assumptions, the capitalized costs of the loss of those new customers is several times the two million dollars per store. For example, in order to merely keep even with previous year's sales, a store needs to attract at least 10% new customers per year to replace those existing customers who are removed from its market. This amounts, as a rough approximation, to an additional $200,000 times the number of years in business, factorial loss in these more difficult to replace sales. (Over a ten year replacement period that would be ($200,000 x 10 years) + ($200,000 x 9 years) +

($200,000 x 8 years) + ($200,00 x 7 years), etc. for a total additional loss of $1 1,000,000 in incremental customer sales per store. Note - any gain of new customers who agree to receive calls would be partially offset in this example by the fact that no allowance has been made for the loss of year to year growth in sales that successful stores would have achieved had customers been reachable.) Bear in mind as well that after the costs of merchandise, salaries, benefits, rent, utilities, advertising, shrinkage and returns the average retail store has a net profit margin of approximately two percent of sales.

Failing to include an EBR exception also will impose systems development costs which are likely to be significant. As described above, calls to existing customers are often generated directly from the retailer's customer records, which may or may not be centralized. In such cases there is no "calling list" which can be compared to a national "do not call list." Retailers will be required to develop new programs and procedures to coordinate their records with such a list (including periodic updates). Avoiding the imposition of these significant systems cost is yet another reason why the Commission and the states wisely chose to recognize established business relationships.

Unintended Conseauences

In the absence of an EBR provision, legitimate companies will undertake efforts to acquire the express verifiable authorization. We want to contrast this FTC alternative with the better approach currently used by the Commission. Both businesses and the Commission will need to carefully consider unintended consequences of requiring alternatives, such as requiring express verifiable authorization to continue (or to establish) previously permissible business relationships, as the FTC has suggested. For those who attempt to obtain authorizations on the sales floor, there will be significant costs in time and logistics in attempting to "sell" the idea of an authorization and to convert written authorizations into a reliable database. The cost of developing and implementing a system *to* receive information from multiple locations and maintain the information in retrievable format may itself be prohibitive. **In** addition, the express authorization requirement is an affirmative burden on the customer. Efforts to obtain authorizations will detract from time that could be spent serving customers. Worse, it will be a waste of customers' time.

When a customer approaches a sales associate, the associate will not know whether the customer has previously provided an authorization. If the authorizations are to become critically important then every sales associate will seek to make an inquiry of the customer at each transaction. Thus customers may well be solicited for authorizations in each department of each store they visit, every time they visit, whether or not they have previously given authorization and whether or not they have even placed their number on the do not call list. Many people already complain of some stores' practice of requesting a telephone number even when they make a cash purchase. The FTC's proposal will have the effect of encouraging even more stores to adopt that practice.'

Some companies will attempt to obtain authorization within the store. Some will rely on direct mail, advertising or the Internet. **A** number of companies will rely on the telephone.

Rather than making a telemarketing call, which would be prohibited under such a rule, some companies will make (possibly multi-purpose) calls to obtain express verifiable authorization for the future. While one would expect legitimate businesses to use this method with discretion, there are less scrupulous companies who will not. By using an express verifiable authorization, rather than an EBR, as a proxy for those customers who might accept a call, the FTC will be placing an economic premium on the authorization as opposed to on the existence of a relationship. <u>All</u> marketers could compete to secure authorizations. This raises a question as to under which scenario consumers will receive more calls:

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[2] In addition, because the FTC proposed rule would link the authorization to a specific phone number, rather than to the name of the customer, the consumer must re-submit the authorization every time she changes her phone number or wants to take calls at a different location. The burden of this aspect of the requirement on both the business and the consumer is particularly unwarranted, because the authorization is based on that individual's relationship with the business – not on her phone number.

Option 1. Those placing themselves on the list block all telemarketing calls except those from companies with which they have an established business relationship. (The latter calls could be reduced through company specific requests.)

Option 2. Those placing themselves on the list block all telemarketing calls except those from companies holding authorizations AND calls from companies seeking to obtain one. (The authorized calls could be reduced through company specific requests; the latter calls could not.)

In addition, as a result of their increased relative value, authorizations are likely to be sought by some marketers in a greater variety of guises.

Timing

If a do not call list is adopted, there are two major timing issues. How often lists should be updated and how long a number should remain on the list.

Updating

Regardless of the update period chosen, the Commission must recognize that it will take time to absorb new do not call numbers into a company's system. None of retailers with whom we have spoken, even the most sophisticated, would be able to confidently implement a scrubbed list in less than a month, unless it were an extremely limited calling program. Most retailers indicated they currently need three months to fully accomplish scrubs of their lists. Furthermore, most current systems cannot update lists while a calling campaign is in progress. Any national do not call rule should recognize these factors.

In addition, as was discussed above, there are costs associated with creating a phone accessible list and updating it on a regular basis. The smaller the company, the more significant these costs and burdens become. Accordingly, the Commission should take care to balance the cost of updating against the desire for instantaneous change.

There are arguments for updating lists yearly. It allows companies the opportunity to refresh their lists during the least busy season of the year (for many retailers this tends to be February) when they are less likely to be distracted by other activities. For consumers, a yearly update is in some ways comparable to having one's name removed from the white pages. In that context, it is expected that it will take an average of six months before a request for an unlisted number becomes fully effective.

If the Commission seeks to tip the balance in the direction of faster deletion, at the cost of greater burden, then a biannual or quarterly update schedule has some advantages. The cost of more frequent updating does not outweigh the relatively modest expedition of the do not call request it would provide. That is, the incremental costs of requiring monthly (as opposed to quarterly) updating is likely to be three times as high, simply to save 60 days. This higher cost to each retailer is continual (i.e. the retailer must purchase and scrub its lists every month, forever) while the compensating cost to a consumer who chooses to place his or her name on the list is a one-time additional two to five month wait.

Duration

The second major timing issue is the length of time an individual's number should remain on the do not call list. Here one must strike a balance between the burden of requiring an individual to reregister their number with the Commission and the cost to commerce of taking out of circulation numbers which have been reassigned to individuals who did not placed themselves on the do not call list.

Fortunately, the burden on the individual is fairly modest. Assuming no consumer payment requirements for a national do not call list, she would dial a toll free access number from her home and then enter her home number once or twice. The number would automatically be entered into the do not call database.

The burden on the marketer of "dead" numbers remaining on the do not call list is considerably greater. If ten percent of the numbers on the list have been reassigned to individuals who did not place themselves on the do not call list, then the do not call list has effectively raised the cost of marketing by slightly over 11% - a significant increase. Accordingly, the greater the likelihood that the do not call list contains dead numbers, the shorter the time period the numbers on the list should remain in effect, provided there is not a compensating great burden to consumers who wish to maintain their do not call status.

It is generally recognized that fifty percent of households change their address within any seven year period.[3] This is not a perfect proxy for changes in telephone numbers. Some people move a sufficiently short distance that they are able to maintain the same telephone number. On the other hand, many telephone numbers change even when the individuals do not move. Some individuals change their number when they decide to make it unlisted. Some numbers change because of reassignment of area codes. Regardless of which occurrence is more likely, if for purposes of estimation, we use the conservative seven year standard, then approximately 7% of telephone numbers change every year. Unless one knows that the persons associated with the numbers on a list have <u>not</u> moved or changed their numbers, within two years every seventh listing on the do not call list would be incorrect. Such an outdated list would impose a substantial increase in costs on businesses. This calculation is much more important when a national list is at issue, rather than a company specific list. In the latter case, dead numbers affect only those companies the consumer has specifically chosen not to communicate with going forward. The harm of dead numbers preventing communications with reassigned numbers for an extended period of time is, while significant, localized. In the case of a

[3] Other estimates suggest **up** to 115 of phone numbers change in any given year

national do not call list however, the harm is multiplied across all sellers, not just the chosen few.

Therefore, the numbers on the national list should be released (or simply reentered by individuals wishing to have their numbers on the list) within two years, unless the list contains a mechanism for ensuring greater accuracy. One possibility is to capture not only the telephone number but the individual's address as well. If the address associated with a number on its list changes, that might be grounds for inquiry and/or removing that number from the list, either because a new person has moved into the old address or the old number has been reassigned to a new address. Such a system would make it more likely that the numbers on the do not call list were the numbers of persons who had chosen to place themselves there.

Depending on the accuracy with which one maintained such a system, it might well be possible to keep unchanged numbers on the list for several (e.g. five) years before there would be a need for individuals to renew their listing. At that point other anomalies not captured merely by number and address (such as death or divorce) would begin to affect the accuracy of the listing.

Alternative Methods of Blocking Unwanted Calls

Increasingly, manufacturers are developing methods for screening unwanted telephone calls. Initially, answering machines made it possible for individuals to return only those calls they wished to receive at their convenience. More recent approaches **are** more technically advanced. Call blocking is one such approach.

Recently, there has been a great deal of publicity for products such as the Tele-Zapper that interposes itself between the consumer's telephone and the calling party. When the device senses an automated call, it returns a tone designed to cause the automated equipment to assume that the consumer's number is no longer active, and causes it to be deleted from its database. Over time the use of such a system can greatly reduce the number of automatic dialing machine calls that a particular number might receive.

Caller ID

In principal, NRF agrees with a requirement that would require that calls placed to a consumer's home display a Caller ID number that can be used by the consumer to contact the caller regarding the solicitation and request that his or her name be placed on the company specific do not call list. In some instances, however, this is a more difficult requirement than it appears.

In some cases Caller ID numbers do not appear because the local exchanges do not convey them. There is nothing that a retailer located in one of those exchange areas can do to change that systemic problem.

Even where numbers can be conveyed, situational and equipment idiosyncrasies can further complicate this proposed requirement. For example, in order to avoid purchasing multiple sets of expensive equipment, the same equipment is often used for multiple marketing programs, as well as for unrelated purposes such as customer service calls, fraud investigation and debt collection.

Because multiple programs are launched from the same equipment, it may not be possible to provide a contact number that can identify the purposes of a particular call. Providing a number that does not connect the consumer to someone with knowledge about the specific call to that consumer may actually be more aggravating to the consumer than providing no number at all.

Central Hudson

Finally, the Commission has asked whether a national do not call list could survive the intermediate scrutiny standard articulated in ***Central Hudson Gas and Electric Corp. v. Public Service Commission (Sup.Ct. 1990).*** The Commission's existing rules and the law on which they were based were clearly cognizant of Central Hudson's effect. The Commission struck a balance, based on the available evidence, that was consistent with the Supreme Court's requirements.

As was mentioned earlier, however, since the Commission adopted its rule, there have been technological changes in the marketplace, and an apparent increase in the number of complaints as to certain practices, as measured by state action and otherwise. **A** careful balancing is still required, but the Court has shown that where there is sufficient evidence, and the duration of the restriction is reasonably related to the purpose to be served (as might, for example, a less than two year do not call listing, as was suggested above, rather than a five to ten year listing), there is not an absolute first amendment bar to the regulation of commercial speech. ***See,*** *e.g.* ***Florida Bar v. Went for It (Sup.Ct.*** *1995).*

Conclusion

We do not question that telephone calls to consumers from some entities with which the consumers have never dealt (and in select cases, from those with which they have) can be annoying. Indeed, calls from certain relatives may have the same effect.

The forgoing observation is distinct, however, from whether the Commission, had it the legislative power to do so, should enact such a nationwide do not call rule. Ideally, were it acting as a legislative body, the Commission would attempt to create **a** solution that reduced the "annoyance" while maximizing the benefits of its actions as to all interested parties. Seeking one goal to the near exclusion of the others, such as completely eliminating the annoyance, likely would result in an over-correction, and far less than optimal benefits.

Unfortunately, that is the direction the proposed FTC rule appears to take. By potentially eliminating all calls from entities (within its jurisdiction) that are unknown by a consumer; and furthermore by prohibiting virtually all calls from entities with whom the consumer has a business relationship, unless the entity has specific verified authority to speak to the consumer, the rule makes avoidance of potential annoyance the ***sine qua non*** of commercial telephonic communication. All other benefits are secondary to this formulation.

In these comments, the NRF has attempted to demonstrate some of the competing benefits and values that the proposed rule ignores. We have also attempted to demonstrate steps the Commission could take, should it chose to proceed, that would provide greater benefits for both businesses and consumers, while still advancing its goals and those of the FTC.

The underlying rulemaking proposal is far more complicated in its implications and in its scope than its drafters may imagine. It is not possible, given the large numbers of individuals and businesses who would be affected, to amass answers to all of the concerns in the limited period of time that has been allowed for public comment. Nevertheless, as always, NRF is willing to work with the Commission and its staff to address these and the other difficult issues this proposal presents.

Respectfully submitted,

Mallory B. Duncan
Senior Vice President, General Counsel
National Retail Federation